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**UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA
 SAN FRANCISCO DIVISION**

SIERRA CLUB, WILDEARTH)	Case No.: No. C 08-850-VRW
)	
GUARDIANS, AND ROCKY MOUNTAIN)	JOINT CASE MANAGEMENT
)	STATEMENT
CLEAN AIR ACTION,)	
)	
Plaintiffs,)	
)	
vs.)	
)	
U.S. DEPARTMENT OF INTERIOR, AND)	
)	
DIRK KEMPTHORNE, in his official)	
)	
capacity as Secretary of the Interior,)	
)	
Defendants)	

1. Jurisdiction and Service: The basis for the court's subject matter jurisdiction over plaintiff's claims and defendant's counterclaims, whether any issues exist regarding personal jurisdiction or venue, whether any parties remain to be served, and, if any parties remain to be served, a proposed deadline for service.

Jurisdiction is based on 28 U.S.C. § 1331 and 28 U.S.C. §§ 2201-2202 . No issues exist over personal jurisdiction or venue and all parties have been served. However, Defendants believe the Court may be lacking jurisdiction because Plaintiffs do not have standing and the case is or will be moot.

2. Facts: A brief chronology of the facts and a statement of the principal factual issues in dispute.

Coal bed methane is a form of natural gas held in coal seams by water pressure. Water permeates the coal beds and its pressure causes the methane to be absorbed onto the grain surfaces of the coal. To facilitate extraction of the methane, the water is pumped out of the coal seams, which lowers the pressure, allowing the release of methane gas from coal.

A hydraulic fracturing technique is sometimes employed to extract the largest quantity of methane possible. This technique uses a mixture of water, fluids and sand, which are forced into wells at very high pressures to hydraulically fracture the coal seams. Sand particles in the hydraulic fluid prop up the widened and newly created fractures in the coal, allowing more methane gas to escape after much of the hydraulic fluid and ground water have been pumped out the wells. At the current time, Defendants do not know whether hydraulic fracturing fluids cause adverse health effects.

1 The Energy Policy Act of 2005 provides:

2 **SEC. 1811. COAL BED METHANE STUDY.**

3
4 (a) STUDY.—

5 (1) IN GENERAL.—The Secretary of the Interior, in consultation with the
6 Administrator of the Environmental Protection Agency, shall enter into an
7 arrangement under which the National Academy of Sciences shall conduct a study
8 on the effect of coal bed natural gas production on surface and ground water
9 resources, including ground water aquifers, in the States of Montana, Wyoming,
10 Colorado, New Mexico, North Dakota, and Utah.

11 (2) MATTERS TO BE ADDRESSED.—The study shall address the effectiveness
12 of—

13 (A) the management of coal bed methane produced water;

14 (B) the use of best management practices; and

15 (C) various production techniques for coal bed methane natural gas in
16 minimizing impacts on water resources.

17 (b) DATA ANALYSIS.—The study shall analyze available hydrologic, geologic and
18 water quality data, along with—

19 (1) production techniques, produced water management techniques, best
20 management practices, and other factors that can mitigate effects of coal bed
21 methane development;

22 (2) the costs associated with mitigation techniques;

23 (3) effects on surface or ground water resources, including drinking water,
24 associated with surface or subsurface disposal of waters produced during
25 extraction of coal bed methane;

and

(4) any other significant effects on surface or ground water resources associated
with production of coal bed methane.

(c) RECOMMENDATIONS.—The study shall analyze the effectiveness of current
mitigation practices of coal bed methane produced water handling in relation to

1 existing Federal and State laws and regulations, and make recommendations as to
2 changes, if any, to Federal law necessary to address adverse impacts to surface or
3 ground water resources associated with coal bed methane development.

4 (d) COMPLETION OF STUDY.—The National Academy of Sciences shall submit
5 the findings and recommendations of the study to the Secretary of the Interior and
6 the Administrator of the Environmental Protection Agency within 12 months after
7 the date of enactment of this Act, and shall upon completion make the results of the
8 study available to the public.

9 (e) REPORT TO CONGRESS.—The Secretary of the Interior and the Administrator
10 of the Environmental Protection Agency, after consulting with States, shall report to
11 the Congress within 6 months after receiving the results of the study on—

12 (1) the findings and recommendations of the study;

13 (2) the agreement or disagreement of the Secretary of the Interior and the
14 Administrator of the Environmental Protection Agency with each of its findings
15 and recommendations; and

16 (3) any recommended changes in funding to address the effects of coal bed
17 methane production on surface and ground water resources.

18 P.L. 109-58 § 1811 (Aug. 8, 2005).

19 It is after August 8, 2006. The National Academy of Sciences has not submitted the
20 findings and recommendations of the study described above to the Secretary of the Interior and
21 the Administrator of the Environmental Protection Agency and has not made the results of the
22 study available to the public.

23 Defendants assert that they have entered into an agreement with the National Academy of
24 Sciences to commence work on the coal bed methane analysis. Plaintiffs dispute that this
25 “analysis,” which has consisted of the National Academy of Sciences holding a meeting to listen
to various presentations but did not produce a written document, is the “study” required by P.L.
109-58 § 1811.

1 3. Legal Issues: A brief statement, without extended legal argument, of the disputed points
2 of law, including reference to specific statutes and decisions.

3 Plaintiffs do not know what issues, if any, Defendants intent to dispute except for
4 whether Plaintiffs have standing to pursue this case, whether this case is moot, and whether the
5 Court has jurisdiction to grant the relief plaintiffs seek. Plaintiffs believe that P.L. 109-58 §
6 1811 imposing a clear mandatory duty which Defendants have clearly violated. Plaintiffs have
7 requested that Defendants explain what basis Defendants have for defending this case other than
8 standing, mootness and that the Court does not have jurisdiction to grant the relief plaintiffs seek.
9 Defendants have not responded.

10
11 As noted in Item 11, below, defendants believe that the type of Court supervision of the
12 reporting process that plaintiffs contemplate is beyond the jurisdiction of this Court and is
13 otherwise unavailable under the Administrative Procedure Act, 5 U.S.C. §§ 701-706.
14 Defendants reserve the right to raise additional issues or defenses, if the Court does not grant
15 defendants' motion for judgment on the pleadings on standing grounds [Dkt. #20].

16 Furthermore, Plaintiffs believe that this case is not record review. *See e.g. Friends of the*
17 *Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000). Defendants believe that this case is
18 reviewable on the administrative record, but that the record may include materials and
19 information developed up to the present, as the Ninth Circuit in *Clearwater* ruled.

20
21 4. Motions: All prior and pending motions, their current status, and any anticipated motions.

22
23 On May 30, 2008, defendant filed a motion for judgment on the pleadings [Dkt. #20]
24 challenging plaintiffs' standing. That motion is scheduled to be heard on the same day as the
25 Case Management Conference, August 28, 2008. If that does not resolve the matter, the parties
anticipate filing cross-motions for summary judgment.

1 5. Amendment of Pleadings: The extent to which parties, claims, or defenses are expected
2 to be added or dismissed and a proposed deadline for amending the pleadings.

3 The parties do not believe the pleadings will need to be amended.
4

5 6. Evidence Preservation: Steps taken to preserve evidence relevant to the issues reasonably
6 evident in this action, including interdiction of any document-destruction program and
7 any ongoing erasures of e-mails, voice mails, and other electronically-recorded material.

8 Plaintiffs have requests that Defendants preserve all e-mails and other electronic
9 documents from management level personnel regarding the preparation of a study pursuant to
10 P.L. 109-58 § 1811. Defendants believe that, because this case is exempted from the initial
11 disclosure requirements, Fed. R. Civ. P. 26(a)(1)(B)(i), the parties are exempted from the
12 otherwise applicable requirements of Fed. R. Civ. P. 26(f), including the requirement to discuss
13 evidence preservation, *see* Fed. R. Civ. P. 26(f)(1). Nevertheless, on April 21, 2008, Defendants
14 undertook steps to preserve documents pertinent to this action and that may be included in the
15 administrative record.
16

17 7. Disclosures: Whether there has been full and timely compliance with the initial disclosure
18 requirements of Fed. R. Civ. P. 26 and a description of the disclosures made.

19 Plaintiffs will make their disclosures shortly. Defendants believe this is not necessary
20 because this is a record review case. *See* Fed. R. Civ. P. 26(a)(1)(B)(i). Defendants to date have
21 received no disclosures from plaintiffs.
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1 8. Discovery: Discovery taken to date, if any, the scope of anticipated discovery, any
2 proposed limitations or modifications of the discovery rules, and a proposed discovery
3 plan pursuant to Fed. R. Civ. P. 26(f).

4 There has been no discovery to date. Plaintiffs believe discovery will be very limited.
5 Plaintiffs believe they will need to obtain some information, via one round of document requests
6 and interrogatories, regarding Defendants' alleged "agreement with the National Academy of
7 Sciences to commence work on the coal bed methane analysis." Plaintiffs will also want to take
8 one third party deposition of someone with the National Academy of Sciences unless the
9 National Academy of Sciences is willing to submit an affidavit consistent with their statements
10 in the media about the lack of an agreement to conduct a study.

11 Defendants believe this discovery is not appropriate, because this is a record review case.
12 Defendants argue that deposition discovery is rarely appropriate in a case brought under the
13 judicial review provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706.
14 *See, e.g., United States v. Morgan*, 313 U.S. 409, 421–22 (1941); *Morgan v. United States*, 304
15 U.S. 1, 18 (1938); *Friends of the Earth v. Hintz*, 800 F.2d 822, 829 & n.6, 834–36 (9th Cir.
16 1986). Nor is it appropriate for the court to conduct an evidentiary hearing or otherwise examine
17 matters outside the administrative record. The "review of agency action . . . is limited to the
18 administrative record and may only be expanded beyond the record to explain agency decisions,"
19 *Northwest Env'tl. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006)
20 (emphasis added), or to otherwise "plug holes" in the record, *Lands Council v. Powell*, 395 F.3d
21 1019, 1030 (9th Cir. 2005).
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1 9. Class Actions: If a class action, a proposal for how and when the class will be certified.

2 N/A

3
4 10. Related Cases: Any related cases or proceedings pending before another judge of this
5 court, or before another court or administrative body.

6 The parties believe that there are no related cases or proceedings pending.

7
8 11. Relief: All relief sought through complaint or counterclaim, including the amount of any
9 damages sought and a description of the bases on which damages are calculated. In
10 addition, any party from whom damages are sought must describe the bases on which it
11 contends damages should be calculated if liability is established.

12 Plaintiffs are seeking injunctive and declaratory relief and costs of litigation, including
13 attorneys' and expert fees. Plaintiffs are seeking a declaration that Defendants are not in
14 compliance with P.L. 109-58 § 1811 and an injunction with a schedule that contains specific
15 dates for the completion of interim and final steps to come into compliance with P.L. 109-58 §
16 1811. Defendants deny that plaintiffs are entitled to any relief and specifically deny that this
17 Court has jurisdiction to grant the type of affirmative relief plaintiffs seek under 5 U.S.C. §
18 706(1). *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64, 66-67 (2004).

19
20 12. Settlement and ADR: Prospects for settlement, ADR efforts to date, and a specific ADR
21 plan for the case, including compliance with ADR L.R. 3-5 and a description of key
22 discovery or motions necessary to position the parties to negotiate a resolution.

23 This case is essentially a deadline suit for a specific duty of Defendants. Counsel
24 involved in this case are very familiar with the strengths and weaknesses of their case and the
25

positions of the other parties. Therefore, the parties do not believe that ADR would necessarily be helpful. The parties had an ADR Phone Conference on May 13, 2008.

Plaintiffs made a conceptual settlement offer to Defendants on April 14, 2008. Plaintiffs requested one document on May 13, 2008 that Defendants mentioned in the ADR Phone Conference, which defendants have provided. Plaintiffs provided Defendants with a draft settlement agreement on May 30, 2008. Defendants have not responded to all of Plaintiffs' settlement offers or requests.

As explained during the ADR Phone Conference, defendants believe that it makes sense to revisit the issue of potential settlement only after a ruling on defendants' motion for judgment on the pleadings.

13. Consent to Magistrate Judge For All Purposes: Whether all parties will consent to have a magistrate judge conduct all further proceedings including trial and entry of judgment.

The parties have not consented to a Magistrate Judge for all purposes.

14. Other References: Whether the case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

N/A

15. Narrowing of Issues: Issues that can be narrowed by agreement or by motion, suggestions to expedite the presentation of evidence at trial (e.g., through summaries or stipulated facts), and any request to bifurcate issues, claims, or defenses.

The parties believe that a trial will not be necessary for this case as the issues should be resolved through dispositive motions.

16. Expedited Schedule: Whether this is the type of case that can be handled on an expedited basis with streamlined procedures.

Plaintiffs believe that this is essentially a deadline suit involving an issue with significant ramifications for public health and ecological health. Therefore, a rapid resolution is appropriate but no special procedures are needed for this resolution. Defendants dispute that this case involves any immediate public or ecological health concerns, given that the dispute in question concerns the conduct of a study, and not the implementation of any particular actions.

17. Scheduling: Proposed dates for designation of experts, discovery cutoff, hearing of dispositive motions, pretrial conference and trial.

The Plaintiffs suggest the following schedule for cross-motions for summary judgment:

Defendants believe that the above schedule is acceptable.

10 Business Days after Court's ruling on Motion for Judgment on the Pleadings	Defendants' File Administrative Record ¹
30 days later	Plaintiffs' motion for summary judgment
30 days later	Defendants' opposition and cross-motion for summary judgment
14 days later	Plaintiffs' reply in support of motion for summary judgment and opposition to Defendants' cross-motion for summary judgment
14 days later	Defendants' reply in support of cross-motion for summary judgment
7 days later	Plaintiffs' optional sur-reply if Plaintiffs believe Defendants have raised new issues in their reply brief.
1 st Available Date	Hearing on cross-motions for summary judgment

18. Trial: Whether the case will be tried to a jury or to the court and the expected length of the trial.

¹ Assuming the Court holds that this case is to be decided based on an Administrative Record.

1 N/A

2 19. Disclosure of Non-party Interested Entities or Persons: Whether each party has filed the
3 “Certification of Interested Entities or Persons” required by Civil Local Rule 3-16. **In**
4 **addition**, each party must restate in the case management statement the contents of its
5 certification by identifying any persons, firms, partnerships, corporations (including
6 parent corporations) or other entities known by the party to have either: (i) a financial
7 interest in the subject matter in controversy or in a party to the proceeding; or (ii) any
8 other kind of interest that could be substantially affected by the outcome of the
9 proceeding.

10 Plaintiffs do not know of any entity with an interest in the subject matter of this case or
11 could be substantially affected by the outcome of the proceeding except Plaintiffs and their
12 counsel.

13 20. Such other matters as may facilitate the just, speedy and inexpensive disposition of this
14 matter.

15 None.

16
17
18 Respectfully Submitted,

19 /s/ Joanne Spalding

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26 Dated: August __, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of August, a true and accurate copy of the Joint Case Management Statement with the Clerk of Court using the CM/ECF system.

Respectfully submitted, this 13th day of August, 2008.

/s/ Hadley A. Davis

Hadley A. Davis

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